Nos. 75-1556 and 75-1565

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK AND ASSOCIATED GAS DISTRIBUTORS,
Petitioners,

v.

FEDERAL POWER COMMISSION, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS CONTINENTAL OIL COMPANY, MOBIL OIL CORPORATION, AND PHILLIPS PETROLEUM COMPANY IN OPPOSITION TO PETITIONS

TOM H. BURTON
P. O. Box 2197
Houston, Texas 77001

Attorney for Respondent Continental Oil Company

C. J. ROBERTS
JOHN L. WILLIFORD
LARRY PAIN
583 Frank Phillips Building
Bartlesville, Oklahoma 74004

Attorneys for Respondent Phillips Petroleum Company

TOM P. HAMILL
ROBERT D. HAWORTH
ROSCOE C. ELMORE
Three Greenway Plaza East
Suite 800
Houston, Texas 77046

CARROLL L. GILLIAM
PHILIP R. EHRENKRANZ
1730 M Street, N.W.
Washington, D.C. 20036

Attorneys for Respondent Mobil Oil Corporation

May 26, 1976

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-1556 and 75-1565

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK AND ASSOCIATED GAS DISTRIBUTORS,
Petitioners,

v.

FEDERAL POWER COMMISSION, *et al.,*
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF RESPONDENTS CONTINENTAL OIL COMPANY, MOBIL OIL CORPORATION, AND PHILLIPS PETROLEUM COMPANY IN OPPOSITION TO PETITIONS

Continental Oil Company, Mobil Oil Corporation, and Phillips Petroleum Company, intervenors in support of the respondent Federal Power Commission below and respondents here, submit this brief in opposition to petitions for writs of certiorari to review the judgment entered in these cases on January 27, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported (AGD App. A and Appendix to this Brief).[1] The Federal Power Commission orders issued April 16, 1973 and June 21, 1973 as to Mobil Oil Corporation are reported at 49 FPC 1009 and 49 FPC 1411; and the orders issued April 27, 1973 and June 1, 1973, as to Continental Oil Company and Phillips Petroleum Company are not reported (AGD App. B).

JURISDICTION

Petitioners properly invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

By the orders affirmed below, the Federal Power Commission authorized natural gas producers to receive Commission-prescribed ceiling rates for "new gas" for the producers' deliveries of natural gas under new contracts negotiated with pipeline purchasers to replace long-term contracts that had expired by their own terms. The maximum rates so allowed previously had been fixed by the Commission as "just and reasonable," after "adjudicatory-type" hearings under Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c and 717d, in area rate decisions affirmed by the Courts;[2] and the specific orders on

---

[1] References are to the Appendices in the Petition of Associated Gas Distributors (AGD) in No. 75-1565. However, part of the majority opinion below does not appear in the AGD Appendix (see p. A-10 *et seq.*). Therefore, the last page of the opinion of the majority below, omitted by AGD, is reproduced as Appendix A to this brief.

[2] As to Mobil, the ceiling rates were prescribed by the Commission's Texas Gulf Coast Area Rate Opinion No. 595, ultimately affirmed in *Public Service Commission for the State of New York*

review also were based upon Commission interpretations of its regulations and policy statements in an area rate decision which has been affirmed on judicial review.[3] The questions presented are:

1. Whether the rational bases, substantial evidence, and conclusions supporting the Federal Power Commission's area rates, interpretations of its regulations, and policy statements set forth in the Commission's area rate decisions may be re-examined or overturned collaterally in subsequent review of specific orders implementing provisions of those Commission decisions, regulations, and statements of policy.

2. Whether the Commission's decision to allow the previously prescribed "just and reasonable" rates for deliveries of natural gas under new contracts replacing contracts which have expired by their own terms is an interpretation of regulations and expression of policy which the Commission is authorized to make under the Natural Gas Act.

3. Whether the Commission's decision to allow the "new gas" ceiling rate for deliveries under new contracts is rational and properly supported by Commission area rate decisions affirmed by the Courts.[4]

---

v. *Federal Power Commission*, 516 F.2d 746 (D.C. Cir. 1975); and as to Continental and Phillips, the ceiling rates were prescribed by the Commission's Other Southwest Area Rate Opinion No. 607, affirmed in *Shell Oil Company* v. *Federal Power Commission*, 484 F.2d 469 (5th Cir. 1973), *cert. denied sub nom., Mobil Oil Corporation* v. *Federal Power Commission*, 417 U.S. 973 (1974).

[3] Commission policies and interpretations involved first were stated in Commission Opinion No. 639, affirmed in *Shell Oil Company* v. *Federal Power Commission*, 491 F.2d 82 (5th Cir. 1974).

[4] These respondents do not agree that these cases present the questions stated by Petitioner in No. 75-1556, and further note that the Petition filed by Associated Gas Distributors in No. 75-1565 fails to state any questions to be considered by this Court in light of this Court's Rule 23-1(c).

STATUTES INVOLVED

Statutory provisions involved are Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c and 717d (AGD App. C).

STATEMENT OF THE CASE

These cases involve orders of the Federal Power Commission accepting for filing under Section 4 of the Natural Gas Act changes of rates submitted in accordance with Commission area rate decisions, interpretations of regulations, and statements of policy which have been affirmed by the Courts of Appeals in other cases. Brief reference thus must be made to the context in which the specific orders were issued and these cases reached the courts:

1. *The "Two-Price" System of Area Rates.* In 1960, the Commission initiated a "two-price" system of guideline rates as the basis of the area rate system of regulation of natural gas producers. *Statement of General Policy No. 61-1*, 24 FPC 818 (1960). One set of guidelines applied to rate increases for existent contracts under Section 4 of the Act, and another set of higher guideline prices applied to review of initial prices in new contracts submitted with applications for certificates under Section 7 of the Act. At that time, the Commission stated:

> "Initial prices in new contracts are, and in many cases by virtue of economic factors, must be higher than the prices contained in old contracts. For this reason, we have found it advisable to adopt two schedules of prices, one pertaining to initial prices in new contracts and one pertaining to escalated prices in existing contracts. It is anticipated that these differences in price levels will be reduced and eventually eliminated as subsequent experience brings about revisions in the various areas." (24 FPC at 819).

Thereafter, in the area decisions issued in the 1960s and early 1970s, the Commission prescribed a two-tier system of area rates. See *Permian Basin Area Rate Proceeding*, 34 FPC 159 (1965), and *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968). Maximum ceiling rates were prescribed for so-called "flowing gas," and higher maximum ceiling rates were prescribed for so-called "new gas." The division between the two classifications was determined by the date of contract between the producer and the pipeline purchaser (*e.g.*, in *Permian*, sales under contracts dated prior to January 1, 1961, were classified as "flowing gas" sales, and sales under contracts executed on or after January 1, 1961, were treated as "new gas"). No express provisions in the regulations prescribed by the area rate decisions were addressed to classification of sales under a new contract which replaces the old contract which expires by its own terms.

The two-tier system was reviewed in *Permian*, and this Court found no fault with the Commission's intent to use price ". . . functionally, as a tool to encourage the production of appropriate supplies of natural gas" (*Permian*, 390 U.S. at 769). This Court concluded that the Commission had authority under the Section 4 "just and reasonable" standard to prescribe different prices ". . . if it has permissibly found that such differences will effectively serve the regulatory purposes contemplated by Congress" (390 U.S. at 797-798).

Subsequent area rate decisions including the two-tier system of area rates were affirmed by the Courts.[5]

[5] See *Mobil Oil Corporation* v. *Federal Power Commission*, 417 U.S. 283 (1974); *Public Service Commission for the State of New York* v. *Federal Power Commission*, 516 F.2d 746 (D.C. Cir. 1975); *Hugoton-Anadarko Area Rate Cases*, 466 F.2d 974 (9th Cir. 1972); *Shell Oil Company* v. *Federal Power Commission*, 484 F.2d 469 (5th Cir. 1973), *cert. denied sub nom.*, *Mobil Oil Corporation* v. *Federal Power Commission*, 417 U.S. 973 (1974).

2. *Commission Opinion No. 639.* Under the two-tier area rate system, an anomalous situation existed when a long-term contract expired. Under the Act, the producer-seller then had the rights to (1) file for unilateral rate increases, subject to Commission suspension, hearing, and decision under Section 4; or (2) file an application under Section 7(b) of the Act seeking "abandonment" of the sale, permitting sale to another interstate or intrastate purchaser.[6] At the same time, if the producer executed a new "replacement" contract, the producer undertook new obligations under an instrument obviously dated subsequent to cut-off dates used to classify "flowing gas" and "new gas" in the area rate decisions.

In 1972, the Commission reviewed this situation in the context of an area rate case in which both area and national data as to supply, drilling, costs, and related facts were considered. *Area Rate For Appalachian and Illinois Areas*, 48 FPC 1299, *reh. den.*, 49 FPC 361 (1973). In its Opinion No. 639, the Commission noted deficiencies in the existing area rate structure; the operation of the two-tier or "vintaging" system discouraged development of full productive capacity on committed acreage; declines in developmental drilling; and inequities in the "vintaging" system.

The Commission concluded that an immediate, required corrective step could be taken ". . . in the application of vintaging concepts by interpretation of the specific language used in setting vintage rates . . ." (48 FPC at 1310). The Commission referred back to its original intent in 1960 to phase-out the experimental two-price system and to language in subsequent area rate decisions. The Commission concluded that the rate for "new gas," previously prescribed as just and reasonable, should be

[6] See *United Gas Pipe Line Company* v. *Federal Power Commission*, 385 U.S. 83 (1966); *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, 364 U.S. 137 (1960).

allowed if: (1) a long-term contract expires by its own terms; (2) the producer and pipeline purchaser negotiate a new, replacement contract; and (3) the producer files the new contract with the Commission as part of its rate schedule under Section 4 of the Act. The Commission stated:

> "We will, thereby, simply adhere to the plain meaning of Order 411, and other orders and opinions with similar language, as written. In time this will result in the elimination of a two-price system, a result we believe intended by the original authors of vintaging and a result we wholeheartedly endorse." (48 FPC at 1310).

The interpretation, policy, and decision were made applicable to all areas.

3. *Affirmance of Opinion No. 639.* New York, supported by AGD, sought reversal of Opinion No. 639 on a variety of grounds. However, the Fifth Circuit affirmed the opinion in its entirety, rejecting the attacks now asserted here by New York and AGD. See *Shell Oil Company* v. *Federal Power Commission*, 491 F.2d 82 (1974).

The Court of Appeals concluded that the Commission had proceeded after adequate notice to the parties, including New York, and without procedural error (491 F.2d at 87-88). After careful assessment of arguments of New York and AGD on the merits, that Court further concluded that the Commission had interpreted its regulations permissibly; the interpretation was consistent with the original 1960 policy statement; and the Commission's interpretation of its regulations was ". . . rational, reasonable, and therefore fully permissible." (491 F.2d at 88-89).

That Court then sustained Opinion No. 639 "in full" (491 F.2d at 90); and neither New York nor AGD

filed petitions with this Court seeking review of the Fifth Circuit's judgment.

4. *The Instant Cases.* The instant cases began in 1973, after issuance of Opinion No. 639, with separate filings by the three producers tendering new contracts replacing long-term contracts which had expired by their own terms, and seeking the previously determined just and reasonable "new gas" area rates for deliveries under the new contracts:

(1) Continental and Phillips filed such new contracts for sales to Tennessee Gas Pipeline Company in fields covered by the Commission's Other Southwest Area Rate Opinion No. 607 (AGD App. A-5); and

(2) Mobil filed a new contract for sales to Texas Eastern Transmission Corporation in a field covered by the Commission's Texas Gulf Coast Area Rate Opinion No. 595 (AGD App. A-4, A-5).[7]

After Commission notice of these filings, AGD and New York filed protests, were permitted to intervene, and urged rejection of the filings. Their objections were based on their objections to Opinion No. 639, then pending on review in the Fifth Circuit. By orders issued April 16, 1973 and April 27, 1973, the Commission overruled the objections, accepted the producers' filings, and authorized collection of the previously-determined just and reasonable area rates for "new gas" for the producers' deliveries under the new, replacement contracts (AGD App. A-47 - A-49; A-53 - A-56). New York and AGD then sought rehearing, which was denied by Commission orders issued June 1, 1973 and June 21, 1973 (AGD App. A-49 - A-53).

[7] In Mobil's docket, the new contract also eliminated Shell Oil Company as a "middle-man" seller between Mobil and Texas Eastern, and Shell already had executed and filed a new contract covering its own sales to Texas Eastern (AGD App. A-4).

New York and AGD then filed separate petitions for review in the Court of Appeals for the District of Columbia Circuit, which were consolidated for argument and decision (Nos. 73-1647, 73-1793, and 73-1794 below).

5. *The Court of Appeals Decision.* The Court of Appeals affirmed the Commission (AGD App. A-2 - A-10 and App. to this Brief), with Judge Robinson dissenting (AGD App. A-13 - A-46).

The majority traced the evolution of the "vintaging" system from the outset, through Opinion No. 639, to the filings made by Mobil, Continental, and Phillips in compliance with the Commission's regulations, policies, Opinion No. 639 and the prior area rate decisions (AGD App. A-3 - A-6). The Court then noted the Commission has a dual statutory function of guarding against "inflated rates" *and* assuring rates ". . . sufficient to encourage vigorous development of an adequate supply" (AGD App. A-6), and that

> "Unhappily, the Commission's creation, vintaging, failed to achieve the desired results" (AGD App. A-7).

The Court found that Opinion No. 639 contained "substantial evidence" to support that "finding of failure" and other evidence, including the decline in well-drilling, to support the Commission's conclusions in Opinion No. 639 (AGD App. A-7 - A-8). The Court stated its "full agreement" with the conclusions reached by the Fifth Circuit in that court's review of Opinion No. 639 in the *Shell* case, discussed *supra* (AGD App. A-8). The Court further observed that the instant cases do *not* involve an area rate order or a "proposed rate structure," but merely the allowance of the "new gas" rates previously fixed as just and reasonable on the basis of evidence, findings, and decisions in the area rate cases (AGD App. A-8 - A-9).

The Court also expressed agreement with analyses by the Fifth Circuit in *Shell*, including the references to arguments there by New York, and stated:

> "No one can say with certainty that additional gas revenues will lead to an increased gas supply. It is apparent, however, that without sufficient revenue to support exploration for new deposits and further development of old deposits, an increased quantum of such activity is unlikely. The evidentiary factors discussed in Opinion No. 639 support that conclusion. The Commission's action, in modifying its earlier interpretation of its own vintaging mechanism, followed a pragmatic, non-doctrinaire approach based on its experience and expertise. It is not illogical to believe that removal of the impediments can result in revival of the impeded activity" (AGD App. A-10).

The Court concluded:

> "As noted in *Placid*, *supra*, the distinction between 'old' gas and 'new' gas is artificial. We agree with the holding in *Shell* that the Commission cannot be charged with error because it chose a literal and strict interpretation of particular language in preference to another possible interpretation. The Commission's interpretation of what constitutes 'new' gas, and application of that interpretation in the present cases, were reasonable actions falling within its authority." (See App. to this Brief).

The petitions to this Court followed.

ARGUMENT

The petitions do not set forth questions, grounds, or reasons requiring or warranting review by this Court:

I. The Decision Below Rests Upon Proper Application of Standards and Principles of Review Applicable to Commission Orders Under the Natural Gas Act, as Expressed by This Court

Here, as in the Fifth Circuit and the court below, New York and presumably AGD seek review of questions as to (1) whether an agency's interpretation of its own regulations is "permissible" or within its "authority," (2) whether an agency's policy is "rational," and (3) whether specific rates are supported by "substantial evidence" even though those rates were found to be so supported and lawful in area decisions long since affirmed by the Courts of Appeals in cases that are final.

New York and presumably AGD thus seek review of questions this Court clearly has held to be within the responsibility of the courts of appeals under Section 19(b) of the Natural Gas Act,[8] and do so after both the Fifth Circuit and the District of Columbia Circuit have canvassed their objections thoroughly, found them without merit, and affirmed the Commission. See AGD App. A-1 - A-10; App. to this Brief; and *Shell Oil Company* v. *Federal Power Commission*, 491 F.2d 82 (5th Cir. 1974).

In *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), and *Mobil Oil Corporation* v. *Federal Power Commission*, 417 U.S. 283 (1974), this Court spelled out criteria for review of Commission rate orders that were followed below:

[8] *Mobil Oil Corporation* v. *Federal Power Commission*, 417 U.S. 283, 309-310 (1974).

(1) The Commission's interpretations of its 1960 policy statements and the regulations prescribed by its area rate decisions were found to be permissible, rational, and within the Commission's authority (AGD App. A-9 - A-10 and App. to this Brief);

(2) The rationale for the Commission's decision to allow the previously-prescribed "just and reasonable" new gas rates for sales under new contracts replacing expired contracts was found to be reasonable and fully supported by "substantial evidence" underlying Opinion No. 639 (AGD App. A-7 - A-9); and

(3) The specific "just and reasonable" rates allowed for these sales by Continental, Mobil, and Phillips actually were prescribed by the Commission more than five years ago on the basis of "substantial evidence" in two area rate opinions, long since reviewed, affirmed, and final under decisions by the Courts of Appeals (see AGD App. A-8 - A-9; *Shell Oil Company* v. *Federal Power Commission*, 484 F.2d 469 (5th Cir. 1973) (Other Southwest Area), and *Public Service Commission for the State of New York* v. *Federal Power Commission*, 516 F.2d 746 (D.C. Cir. 1975) (Texas Gulf Coast Area).

Thus, each required base has been touched. There is no error or conflict below; and nothing in these cases presents a ". . . rare instance when the standard appears to have been grossly misapprehended or grossly misapplied" by a court of appeals, warranting intervention of this Court (*Mobil*, 417 U.S. at 309-310).

Indeed, New York and AGD now have been afforded two bites at the Commission's Opinion No. 639, and no court of appeals has found any merit in any of the contentions of New York and AGD. In the instant cases, New York and AGD thus mounted what actually was a collateral attack upon Opinion No. 639, already on review in the Fifth Circuit, and upon area rate decisions

already final. Having failed in the Fifth Circuit and failed to seek review of the central opinion involved, New York and AGD thus now seek piecemeal, collateral review of the same issues by a deluge of pleadings before the Commission and petitions to the courts of appeals, repeating tales that are now more than twice-told and now more than twice found faulty by the courts below.[9]

The instant cases thus present ministerial agency action implementing policies, regulations, and rates prescribed in other decisions, now fully considered and affirmed in other review proceedings. Such litigation should be brought to an end; neither the administrative process nor the judicial process is served by repetitious, collateral reviews of the same issues, case after case. The uncertainties over Commission policies, adverse to all interests, engendered by these steps should be ended by prompt denial of the petitions in these cases.

II. Commission Opinion No. 639 and the Orders in These Cases Are Lawful Exercises of Commission Authority, Are Rational, And Are Properly Supported

To the extent that New York and AGD seek review of the Commission's interpretation and application of its own regulations, there are no errors to be reviewed, as the Courts of Appeals have found (*Cf.* New York Pet., pp. 10-12; AGD Pet., pp. 8-11).

---

[9] In its later Opinion No. 699, the Commission has prescribed a new national rate structure including the same principles as to treatment of replacement contracts previously announced in Opinion No. 639. New York and AGD similarly attacked that opinion, but the Commission was affirmed in *all* respects. *Shell Oil Company* v. *Federal Power Commission*, 520 F.2d 1061 (1975), *reh. denied*, 525 F.2d 1261 (5th Cir. 1976), pets. for writs pending in Nos. 75-1289, *et al.*

First, in Opinion No. 639, the Commission found the original intent of its 1960 policy statement to call for subsequent phasing out of the two-price system and found that the literal language of its regulations, classifying sales by "date of contract," fully permitted authorizing the "new gas" rate for new contracts replacing expired contracts. In *Shell*, the Fifth Circuit canvassed the same historical and current materials and agreed with the Commission:

> "Significantly, in this policy statement the Commission indicated its intention eventually to use a unitary pricing system." (491 F.2d at 88)
>
> * * * * * *
>
> "We conclude that FPC is acting consistently with its original views on vintaging by phasing out that concept with a narrow interpretation of its existing regulations." (491 F.2d at 89).

And, the District of Columbia Circuit reached the same conclusion (AGD App. A-6 - A-8).

Second, New York and AGD contend that the orders in the instant case, and back of them Opinion No. 639, are unsupported, and do not rest upon required findings or "substantial evidence" (New York Pet., pp. 11-14; AGD Pet., pp. 8-11). Again, however, the Courts of Appeals reviewed the records and found adequate rationale, findings, and substantial evidence. In *Shell*, the Fifth Circuit had before it the record which produced Opinion No. 639, considered the same argument, found the Commission's actions ". . . rational, reasonable, and therefore fully permissible" (491 F.2d at 89), and found "substantial evidence" to be a question of reference to the area rate decisions (491 F.2d at 89-90). Similarly, the court below found "substantial evidence" in Opinion No. 639 to support the "finding of failure" of the vintaging system, still touted by New York and AGD; found the Commission's corrective steps fully supported; and made

the same reference to content of the area rate records (AGD App. A-7 - A-9).

Third, New York and AGD apparently seek what would be a self-defeating anomaly in administrative law: a requirement for repetition, by rote, of each and every finding from a basic opinion in each and every specific order evidencing agency action implementing the policies and decisions set out in that basic opinion. As to such arguments, the court below did review the basic opinion, as sought by New York and AGD through the vehicle of attacking implementing orders, but properly turned to that opinion and prior Commission decisions for rationale and support (AGD App. A-9 - A-10).

In sum, what New York, and presumably AGD, seek to posit as errors below actually are but criticisms of review procedures required below because of the collateral route chosen by New York and AGD for their second attack upon Commission Opinion No. 639.

III. New York and AGD Actually Seek Review of Agency Choices of Policy and Rate Design Correctly Upheld by the Courts of Appeals

New York and AGD apparently recognize that the current natural gas shortage requires an overhaul of the area rate structure, corrective action by the Commission, and continued use of price as an incentive and functional tool to increase natural gas production, as approved in *Permian* (New York Pet., pp. 13-14; AGD Pet., pp. 12-15). However, their disagreement with Commission choices and policy decisions does not rise to the level of questions for judicial review.

Thus, New York and AGD suggest that the Commission's policy as to replacement contracts should be modified to include features drawn from Commission Order No. 455 procedures, "special relief" procedures, or "plowback" formulae tied to forgiveness of refunds due for

past collection of excessive rates (New York Pet., pp. 12, 14; AGD Pet., pp. 12-15). New York and AGD miss significant distinctions: (1) these "plow-back" and special relief features are part of procedures and formulae either allowing or forgiving collection of rates *exceeding* the just and reasonable rates prescribed by Commission area decisions; but (2) the policy and rate design as to replacement contracts are for allowance of the *previously-*prescribed "just and reasonable" rate *within* the maximum ceiling rate structure. The analogy New York and AGD seek to draw thus is misplaced, as the Courts of Appeals recognized.

New York and AGD also seem to suggest that the Commission erred in seeking to solve the replacement contract problem on a generalized basis, through generally-applicable regulations, filing criteria, and previously-prescribed ceiling rates. The alternative they seem to suggest is a reversion to case-by-case hearings on individual contracts, an approach to producer rate regulation necessarily abandoned as administratively infeasible sixteen years ago. This, too, warranted little attention in the Courts of Appeals.

New York and AGD also are disturbed by the growing number of replacement contracts submitted to the Commission (New York Pet., 14; AGD Pet., pp. 13-15). These numbers should be a source of comfort, not of concern. What they show is that hundreds of expired contracts *are* being renegotiated; that producers thereby *are* undertaking new long-term obligations; that, in each such instance, there will be no application for "abandonment" under Section 7(b) of the Act; and that, in each such instance, instead of terminating leases and seeking all cessation of deliveries, the producer is undertaking to continue deliveries and sales to an interstate purchaser. These scores of new contracts thus are a ground to encourage the Commission's effort, not a reason to destroy it.

Lastly, New York and AGD, as usual, question the efficacy of the Commission's policies unless modified to include particular procedures and detailed restrictions advocated by them. On these points, neither producers nor the Commission can guarantee anyone that these policies or any number of replacement contracts will bring an end to natural gas shortages in New York or on the AGD systems. The truly relevant points are missed by New York and AGD, but were not missed by the Courts of Appeals. As perceived by the Fifth Circuit in *Shell*:

> "If the higher rates do stimulate production, the extra increment for flowing gas will supply needed capital for exploration and drilling. Precedent, moreover, supports the view that FPC does not necessarily create a windfall when it includes in the price of flowing gas an increment for further exploration and development. We approved in *SoLa II* a rate structure with just such an increment." (491 F.2d at 82).

And, as stated by the court below:

> "It is apparent, however, that without sufficient revenue to support exploration for new deposits and further developments of old deposits, an increased quantum of such activity is unlikely. * * * It is not illogical to believe that removal of impediments can result in revival of the impeded activity." (AGD App. A-10).

New York and AGD, nevertheless, persist in seeking further to impede required activity by asserting (1) their own erroneous interpretations of 1960 Commission policy statements, (2) their interpretations of Commission regulations which have been rejected by the agency and two Courts of Appeals, and (3) their own views, which already have failed, as superior to policies the Commission now has found to be in the public interest, with the approval of the Courts of Appeals, to seek to assure consumers an adequate supply of natural gas.

The petitions present no questions of law, and, plainly, no issues requiring review by this Court.

CONCLUSION

For the foregoing reasons, the petitions should be denied.

Respectfully submitted,

TOM H. BURTON
P. O. Box 2197
Houston, Texas 77001

Attorney for Respondent Continental Oil Company

TOM P. HAMILL
ROBERT D. HAWORTH
ROSCOE C. ELMORE
Three Greenway Plaza East
Suite 800
Houston, Texas 77046

C. J. ROBERTS
JOHN L. WILLIFORD
LARRY PAIN
583 Frank Phillips Building
Bartlesville, Oklahoma 74004

Attorneys for Respondent Phillips Petroleum Company

CARROLL L. GILLIAM
PHILIP R. EHRENKRANZ
1730 M Street, N.W.
Washington, D.C. 20036

Attorneys for Respondent Mobil Oil Corporation

May 26, 1976

APPENDIX

APPENDIX A

(last page of opinion of Court of Appeals' majority opinion omitted from Appendix to Petition in No. 75-1565)

11

> The gas industry is different from metropolitan transit in that it requires a constant infusion of entrepreneurship of the highest order if even basic public needs are to be satisfied. * * * On the other hand, we count upon persons who carefully weigh investment risks for our supply of natural gas. We think the Commission here, having calculated the dangers involved in allowing the gas supply to lapse, and the probabilities that its estimates might be too low, is justified in having added the small noncost factors it thought were necessary. It found that it needed to do so to protect the public interest and not to assure any rights of gas producers.

As noted in *Placid*, *supra*, the distinction between "old" gas and "new" gas is artificial. We agree with the holding in *Shell* that the Commission cannot be charged with error because it chose a literal and strict interpretation of particular language in preference to another possible interpretation. The Commission's interpretation of what constitutes "new" gas, and application of that interpretation in the present cases, were reasonable actions falling within its authority.

The orders under review are affirmed.